

**DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Application of

Thomas Morgan III

SCUP14206

For a Shoreline Substantial Development/
Conditional Use Permit

Introduction

Thomas Morgan III applied for a Shoreline Conditional Use Permit for the action taken in 2005 to replenish the beach with sand, cobble and mixed rock and pea gravel at 10700, 10730 and 10770 Country Club Road.

An open record public hearing was held February 4, 2009. Dennis Reynolds, attorney at law, represented the applicant. Joshua Machen, Senior Planner, represented the Department of Planning and Community Development

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony and exhibits admitted at the hearing, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner in this matter.

Findings

1. In 2005, Thomas Morgan III replenished the beach in front of his property at 10700, 10730 and 10770 Country Club Road with sand, cobble, and mixed rock and pea gravel. The three waterfront lots are armored with a concrete bulkhead and, over time, the beach waterward of the bulkhead had hardened and lowered to the point that the toe of the bulkhead was in danger of being exposed. He did not obtain a shoreline permit for the replenishment project and the City issued a Notice of Violation.
2. On August 18, 2008, Mr. Morgan applied for an “after-the-fact” shoreline conditional use permit and shoreline substantial development permit for the “Morgan Sand and Cobble Replenishment” project. The replenishment involved over 7,000 square feet of beach and included 40-50 cubic yards of sand, 40-50 cubic yards of mixed round river rock, and 20-30 cubic yards of non-select pea gravel. (Exhibit 17) The application was determined to be complete on October 1, 2008. (Exhibit 24)

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3. The City mailed and published a Notice of Application and posted the property.
4. The subject property consists of three waterfront parcels developed with single-family residences, totaling 3.46 acres on the southern shore of Port Blakely. A fourth parcel has no waterfront. The property has a Comprehensive Plan designation of Open Space Residential, two residences per acre, and zoning designation of Residential 2 Units Per Acre (R-2). It is within the shoreline and is designated as Semi-Rural environment by the City's Shoreline Master Program. That environment is intended to allow for low to medium intensity residential development while protecting natural resources.
5. The surrounding properties have similar designations and are developed with single family residences.
6. The City was provided a report from Margenex International describing the impacts of the activities of the replenishment activity based on observations by Mark Pedersen, a fisheries scientist who was formerly a marine fish management biologist with the Washington Department of Fish and Wildlife, from his visit in October 2005 (Exhibit 14), and a report of the results of a survey by a fish biologist under the supervision of Mr. Pedersen for surf smelt and sand lance spawn in the vicinity of the subject property in January 2007. (Exhibit 12). Additionally, the report of Mr. Pedersen's visit to the site in February 2007 to delineate the Ordinary High Water Mark was provided.
7. The first report concluded that the placement of the sand at the foot of the retaining wall on the westernmost lot would likely have had a positive environmental effect in that it nourished the beach, which would mitigate the effect of the bulkheads. The round rock placed on the beach was found to be indistinguishable from the existing native cobble, but placed at a higher elevation than it appeared to have been previously. The placement of the round rock at the base of the bulkhead may serve to dissipate the energy of the waves in the ferries' wake that appears to be a major cause of the erosion of the beach. The summertime placement of the pea gravel was deemed likely to have had no negative effect on spawning of surf smelt which spawn in the winter and may have provided additional beach materials that could be utilized as spawning substrate for forage fishes. The report observed that the rocks are beginning to support attachment macro algae and invertebrate habitat, as well as serving to dissipate wave energy, and concluded that removal of the materials would probably do ecological harm.
8. The biologist who sampled sand and gravel in the vicinity for spawn found no evidence of surf smelt or sand lance eggs.
9. Mr. Pedersen visited the property three weeks after his February 2007 visit to determine the OHWM along the Morgan's beach to see if he could discern what materials had been deposited and what was natural. He found the cobble covered with barnacles and bladderwort.
10. Bainbridge Island's SMP, which is an element of the Comprehensive Plan, contains policies and regulations, incorporated into the Municipal Code, applicable to this proposal. Section 16.12.050, Archeological and historic resources, requires that work be stopped and permission be obtained to proceed if such archeological resources are discovered. The work done involved only minor excavations and no archaeological resources were identified. Section 16.12.070, Environmental Impacts, provides regulations to minimize impacts of shoreline activities. Section 16.12.080, Environmentally sensitive areas, is intended to supplement the

regulations in the Critical Areas chapter to protect sensitive areas from disturbance and require replacement of the resource function if there is disturbance. Section 16.12.300, Beach Enhancement, addresses upgrading shorelines for the purposes of stabilization and recreational enhancement, among others. The regulation supports enhancement except within spawning, nesting, or breeding habitat and where littoral drift of the enhancement materials would harm spawning grounds. The area of the action was determined not to be a spawning, nesting or breeding habitat.

11. The City's Responsible Official issued a Determination of Nonsignificance (DNS) pursuant to SEPA on December 23, 2008. [Exhibit 26] The DNS was not appealed.

12. The Director recommended approval of the Shoreline Conditional Use subject to imposition of a condition prohibiting additional beach nourishment or bulkhead repairs without appropriate permits. The applicant agrees that the condition is appropriate.

13. Section 16.12.380C(1) provides:

Uses classified as conditional uses may be authorized; provided, that the applicant can demonstrate all of the following:

- a. The proposed use will be consistent with the policies of RCW 90.58.020 or its successor and the policies of the master program.
- b. The proposed use will not interfere with the normal public use of the public shorelines.
- c. The proposed use of the site and design of the project will be compatible with other permitted uses within the area.
- d. The proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is located.
- e. The public interest suffers no substantial detrimental effect. (WAC 173-14-140(1) or its successor.)
- f. The proposed use is consistent with the provisions of the zoning ordinance (BIMC Title 18) and the comprehensive plan (Ordinance No. 94-21).

14. Section 16.12.350B provides that:

1. The City of Bainbridge Island hearing examiner is vested with authority to:
 - a. Approve, approve with conditions, or deny shoreline variance and shoreline conditional use permit applications after a public hearing and after considering the findings and recommendations of the director, which shall be given substantial weight; provided, that decisions may be appealed in accordance with BIMC 16.12.370.B.

15. The policies of the Shoreline Management Act set out in RCW 90.58.020 include protecting against adverse impacts to the land, to its vegetation, and to wildlife and the waters of the state. The action taken would protect against adverse impacts to the single- family residential properties and appears to have had no adverse affect on any vegetation, wildlife or the waters.

16. Beach nourishment is consistent with the policies of the Shoreline Management Act and the City's Shoreline Master Program.
17. The beach nourishment would not have any effect on the public use of the beach.
18. The other uses in the area are single-family residences. The beach nourishment did not have any adverse effect on those uses and some may have benefited from the additional sand and gravel that would move along the drift cell so the action was compatible.
19. The owner of property adjoining the subject property to the east was concerned about the materials affecting her property but because the drift in the area is from the east to the west and her property is immediately to the east of the subject property, the material that is eroded or carried away should drift toward the west only so her property should be unaffected.
20. The beach nourishment may have had a temporary impact but no unreasonably adverse effects to the shoreline environment. Removal could cause more harm than good at this point.
21. The public interest suffered no substantial detrimental effect from the beach nourishment action.
22. The addition of material may have provided protection of the residential use and enhanced the recreational use of the shoreline.
23. Because beach nourishment is encouraged when the shoreline is depleted of naturally occurring sediment sources, it is unlikely that any cumulative impact caused by such replacement on other properties would be harmful.
24. The replenishment is and was consistent with the provisions of the zoning ordinance and the comprehensive plan.
25. The adjacent property owner expressed concern in her comment letter, Exhibit 41, about the depiction of the common property line in the notice showing a skew in the line at the point it reaches the second class tidelands. Where the shoreline is not a straight line, as at this location, the tidelands are usually apportioned by what is often termed the "headland" rule, which may have resulted in the skew in the property line shown on the map.

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this matter.
2. Notice and public hearing requirements of the Code were met.
3. As the findings show that all of the criteria for approval of conditional use are met, the application should be approved with the recommended condition.

Decision

The Shoreline Conditional Use Permit is granted subject to the following condition:

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No additional beach nourishment or shoreline bulkhead repairs shall occur on the beach without first obtaining proper permits from local, state and federal agencies as appropriate.

Entered this 11th day of February 2009.

/s/ Margaret Klockars

Margaret Klockars
Hearing Examiner *pro tem*

Concerning Further Review

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

The decision of the Hearing Examiner is the final decision of the City in this matter. The State Department of Ecology will approve, approve with conditions or deny the conditional use within the 30 days of the date it receives the permit from the City. Appeal of the Department of Ecology's decision is to the Washington State Shorelines Hearings Board as provided by RCW 90.58.180 (or its successor) and Chapter 461-08 WAC (or its successor). To be timely, petition for review must be filed within the 21-day appeal period following the decision by the Department of Ecology. [see BIMC 16.12.380].